No. 87-1258

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGE J. PLATSIS,

Petitioner,

V.

E.F. HUTTON & COMPANY, INC.,

Respondent.

# PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Petitioner's Reply Brief

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Respondent makes several assertions in opposition to the Petition for a Writ of Certiorari, only one of which requires a response, i.e., that the questions presented will not dispose of the case in Petitioner's favor.

The Trial Court made findings of fact from which certain erroneous conclusions of fact and law were drawn. The Court of Appeals

affirmed, without making any additional findings of fact or law, relying heavily upon Kennedy v. Josephthal & Co., 814 F2d 798 (1st Cir., 1987). Therefore, it was incumbent upon Petitioner to discuss the inapplicability of that case while at the same time demonstrating that the Trial Court's opinion conflicts with legal doctrines of this Court. Further, Petitioner asserts that the recognized fraud-on-the-market theory of recovery should be extended from open market transactions to "new issue" sales controlled by underwriters such as Hutton, which in reality is a market maker.

Allowing the lower courts' decisions to stand, without modification and partial reversal as to their finding of no liability under Rule 10b-5, would 1) allow manifestly erroneous conclusions of law to become inappropriate if not dangerous precedent, 2)

discourage private enforcement of securities law, Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 136 (1968), and 3) undermine decisions of this Court which have been responsible for restoring investor confidence.

Contrary to Respondent's assertion, Petitioner seeks reversal of the Trial Court's legal conclusions set forth in appendix pages 51a-67a and 75a-81a. If its legal analysis is incorrect, and Petitioner is entitled to relief, this case must be remanded for a determination of damages under the Exchange Act of 1934.

All the necessary elements to prove that Petitioner is entitled to monetary relief under Rule 10b-5 are set forth in his Petition.

To recover under Rule 10b-5(a) and (c) a preponderance of the evidence must establish

the following elements: 1) that the omissions were material, Affiliated Ute Citizens v. United States, 405 U.S. 128 (1972); 2) that Hutton had a duty to disclose known material facts, i.e., a duty of honesty and fair dealing, Bateman-Eickler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 313 (1985); 3) that Hutton acted with something more than mere negligence, Ernst & Ernst v. Hockfelder, 425 U.S. 185 (1976); 4) that Petitioner detrimentally relied upon the acts, practices and omissions of Hutton, Affiliated Ute, and in the context of this case, 5) that state of the art projections, utilized in the oil and gas business for years, are material "facts". Eisenberg v. Gagnon, 766 F2d 770, 775 (3rd Cir., 1985). [There is no question that the programs are securities sold by the use of the requisite jurisdictional means (68a).]

Such essential proofs may be established

by direct admissions of the defendant or inferred from circumstantial evidence, findings of fact, or findings of law.

A duty to disclose material facts is self evident from the Trial Court's finding that "unquestionably" Petitioner received investment advice from Hutton (114a) and Hutton's duty of honesty and fair dealing. Berner.

Direct proof of detrimental reliance is also not required. Affiliated Ute.

Direct proof of "scienter" is not required because something more than negligence may be inferred from repeated sales of demonstrably worthless securities. Indeed, knowledge with intent to defraud can be inferred where an issue is "so lacking in basic requirements that ... had any one of the participants in the scheme not acted with intent to defraud or in reckless disregard of"

whether others were perpetrating a fraud, the issue would never have been marketed. Shores v. Sklar, 647 F2d 462, 468 (5th Cir., 1981).

Finding that an issue is unmarketable is tantamount to establishing scienter in its sale.

During its motion for directed verdict, defense counsel argued "Plaintiff is a sophisticated ... capable ... well educated person capable of understanding the transactions ... [he knew prospectuses] did not have rate of return [to prior investors] ... projections ... what assets they might find ... reserves in other programs" (Transcript, pp. 1152-3). That also describes the underwriter Hutton. Hutton knew that knowledge of reserves was essential to any evaluation of these investments (Pet. pp. 9, 13, 30). As an underwriter-broker, it knew "due diligence" projections were substantially

lower than, and conflicted with, issuers' reports for the same reserves. Nevertheless, Hutton circularized issuers' reports rather than its own "due diligence" projections. Hutton encouraged investors to review issuers' reserve reports. (Pet., p. 13).

In short, if Petitioner knew or should have known at the time of his investment in 1981 that he was about to be defrauded, then clearly Hutton knew at the same time that it was defrauding thousands of investors.

Indeed, the question posed by Petitioner is whether proof of reliance is required when an underwriter-broker withholds known profitability projections which established without question these investments were unsuitable for any investor's purpose. (Pet., p. 23). Hutton's knowledge of serious discrepancies between the information investors received and Hutton's own data,

which undermined the very purpose for which these investments were sold, is documented throughout the Petition. (Pet., pp. 8, 9, 11, 13, 18-22, 33, 34, 45).

Therefore, knowledge of falsity with intent that investors rely on issuers' reports is sufficient to establish scienter. Shores, 647 F2d at p. 468.

To any extent necessary to correct errors of law by a lower court, or indeed to provide adequate relief to litigants, this Court has reviewed evidentiary records to supplement and extend findings of the courts below. United States v. General Motors, 384 U.S. 127, 141 (1965), Bose Corporation v. Consumers Union of the U.S., Inc., 466 U.S. 485, 500, 501 (1984).

Finally, the last element required to establish a claim under Rule 10b-5(a) and (c) is materiality of the omissions or whether Hutton committed a fraud on the market. These

are amply discussed in the Petition, expressly and by inference from the record and law applicable to cases of this kind.

Where Hutton admits reserve data is important in making an investment decision and such data is essential for state of the art due diligence and comparisons with other investments, it is erroneous as a matter of law for the Trial Court to conclude that discovered and discoverable reserve data are not material to an investor's decision.

Petitioner is not asking this Court to change the lower courts' findings of fact. Petitioner asks only that the inferences of fact drawn by the Trial Court and its application of the law to those facts and inferences be carefully examined because they are not in accord with the law announced by this Court and other Courts of Appeals.

Therefore, contrary to Respondent's first

assertion, all of the elements necessary to establish a claim under Rule 10b-5(a) and (c) are before this Court, i.e., Hutton's knowledge and intent, Hutton's duty to disclose, materiality of omitted projections and detrimental reliance.

## RELIEF

WHEREFORE, Petitioner prays this Honorable Court grant certiorari and reverse the Trial Court's finding that Petitioner failed to prove claims arising under Rule 10b-5(a) and (c), and remand this case to the Trial Court for a determination of damages under the Exchange Act of 1934.

Dated: March 11, 1988

Respectfully Submitted,

By George Platsis

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